

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| VERNELL D. LECATO, | § | |
| | § | No. 152, 1999 |
| Defendant Below, | § | |
| Appellant, | § | Court Below: Superior Court of |
| | § | the State of Delaware in and for |
| v. | § | Kent County. |
| | § | |
| STATE OF DELAWARE, | § | Cr. A. No. K98-01-0217 |
| | § | |
| Plaintiff Below, | § | Cr. I.D. No. 9801000685 |
| Appellee. | § | |

Submitted: March 14, 2000
Decided: October 10, 2000

Before **VEASEY**, Chief Justice, **WALSH** and **BERGER**, Justices.

ORDER

This 10th day of October 2000, it appears to the Court that:

(1) At approximately 7:40 p.m. on January 3, 1998, Officer Anthony DiGirolomo was conducting surveillance of 104 South New Street in the City of Dover. DiGirolomo had a view of the activity near 104 South New Street from his location on the second floor of a house across the street.¹ That evening, DiGirolomo observed Vernell Lecato apparently selling a substance to Herbert Jacobs. Uniformed officers

¹ DiGirolomo testified that he used binoculars and that the area was lit by high intensity street lights. His ability to see the incriminating transaction from his vantage point at nighttime was an issue at trial.

then arrested both Lecato and Jacobs. While in police custody, Lecato admitted selling Jacobs 0.2 grams of crack cocaine.²

(2) At the outset of Lecato's trial in Superior Court, the trial judge informed the parties that one of the empaneled jurors, Timothy Freud, was married to Commissioner Andrea Maybee of the Superior Court in and for Kent County. The judge had already spoken with Commissioner Maybee about her involvement with Lecato's case and whether she had discussed the case with Freud. From the case file it was determined that she had modified Lecato's bail.³ She did not, however, have any memory of his case and was certain that she had not mentioned it to Freud. Lecato nevertheless objected to Freud's service as a juror and requested that the Superior Court replace him with the first alternate juror. The Superior Court denied Lecato's request without conducting any *voir dire* of Freud.

(3) The jury found Lecato guilty of delivery of a narcotic Schedule II controlled substance in violation of 16 *Del. C.* § 4751. The Superior Court sentenced him to serve life in prison as a habitual offender under 11 *Del. C.* § 4214(b).

(4) Lecato contends that the Superior Court erred by refusing to *voir dire* Freud to determine if he had any prior knowledge of Lecato's case before it denied the

² At Lecato's trial, Jacobs admitted purchasing crack cocaine on the evening of January 3, 1998, but denied that Lecato had sold him the cocaine.

³ Commissioner Maybee modified Lecato's bail from \$5,000 cash to \$10,000 secured, in effect making it easier for the defendant to meet bail.

motion to excuse Freud from the jury. The State responds that *voir dire* was unnecessary because Lecato offered no articulable reason to question Freud's impartiality. This Court reviews for abuse of discretion the Superior Court's denial of a request to excuse a juror for cause.⁴

(5) Preliminarily, to challenge Freud's service on appeal, Lecato must demonstrate that he exhausted all of his peremptory challenges at trial.⁵ Here, the jury selection does not appear to have been transcribed and Lecato does not state whether or not he had any peremptory challenges remaining when the Superior Court denied his request to excuse Freud. If Lecato had peremptory challenges remaining at the time the Superior Court ruled, his claim on appeal is precluded.⁶

(6) Assuming that Lecato did not have any peremptory challenges remaining, a juror may be excused if he or she "would be unable to render impartial jury service or would be likely to disrupt or otherwise adversely affect the proceedings."⁷ To make that determination, "the court shall conduct or permit such examination as is reasonably calculated to ascertain prejudice of a juror."⁸

⁴ See *Manley v. State*, Del. Supr., 709 A.2d 643, 656 (1998).

⁵ See *Holmes v. State*, Del. Supr., 422 A.2d 338, 341 (1980).

⁶ *Id.*

⁷ 10 *Del. C.* § 4511(c).

⁸ Super. Ct. Crim. R. 24(a).

(7) The Superior Court did not err by allowing Freud to serve as a juror. The court conducted an “examination . . . reasonably calculated to ascertain prejudice of a juror” and was satisfied that Freud did not have prior knowledge of Lecato’s case. The Superior Court fulfilled this requirement by questioning Commissioner Maybee about her involvement with Lecato’s case and about any discussions she may have had with Freud relating to the case. The court’s examination revealed that Commissioner Maybee’s involvement was limited to her modification of Lecato’s bail and that the Commissioner was “certain she did not ever have occasion to mention it to her husband.” Therefore, no reason existed to believe that Freud could not serve impartially on Lecato’s jury.

(8) Lecato next contends that the Superior Court erred by admitting into evidence a photograph of the crime scene without properly authenticating it. The photograph, which was taken over a year after the drug transaction, showed a street light that DiGirolomo could not say with certainty had been there to illuminate the scene on the date of the crime. Lecato argues that because of this uncertainty the foundation for admission required by D.R.E. 901(a) was not established.

(9) The authentication requirement of D.R.E. 901(a) is satisfied by “evidence sufficient to support a finding that the matter in question is what the proponent

claims.”⁹ This Court reviews the Superior Court’s decisions on the admissibility of evidence for abuse of discretion.¹⁰ In the *voir dire* hearing on the admissibility of the photograph, DiGirolomo testified that the picture was an accurate depiction of the scene on the night in question, except for the street light, of which he said, “I don’t remember if it was specifically there or it was just added.” He also testified that he had no reason to believe that the light had not been there. This testimony satisfies the authentication requirement.¹¹ DiGirolomo conceded in his trial testimony that he could not specifically recall whether the street light had been there on the night of the crime, allowing the jury to weigh the photograph in light of that uncertainty.¹²

(10) Lecato’s third claim on appeal is that the Superior Court violated Lecato’s right to confront witnesses¹³ by cutting off his questioning of DiGirolomo on *voir dire*

⁹ D.R.E. 901(a).

¹⁰ See *Floudiotis v. State*, Del. Supr., 726 A.2d 1196, 1208 (1999).

¹¹ See *id.* at 1208 (affirming the admission of photographs on the testimony of an officer that they were a “pretty accurate depiction” of the crime scene).

¹² See *State v. Magner*, Del. Supr., 732 A.2d 234, 245 (1997).

¹³ See U.S. Const. amend VI; Del. Const. art I, § 7.

and cross-examination.¹⁴ This Court reviews de novo claims alleging the infringement of a constitutionally protected right.¹⁵

(11) Our examination of the record convinces us that the Superior Court did not place improper restrictions on Lecato's ability to confront Officer DiGirolomo either in *voir dire* or on cross-examination.¹⁶ At *voir dire*, DiGirolomo testified that he could not specifically recall whether the street light appearing in the photograph had been on the crime scene a year earlier. He also testified that he had no reason to believe that it had not been there. Lecato's counsel then asked a series of questions with the goal of "testing Officer DiGirolomo's testimony" on the latter point, prompting the Superior Court to interject that "this seems to be going beyond *voir dire* on the admissibility of this photograph." This questioning went to the credibility of DiGirolomo's testimony regarding the one street light and how well he could see on the night of the crime and thus went beyond the authentication inquiry. The Superior Court noted that Lecato would have an opportunity to ask those questions at trial. Therefore the Superior Court's intervention did not violate Lecato's right to confront the witness.

¹⁴ This questioning related to the admissibility and accuracy of the photographic evidence referred to above.

¹⁵ See *Williamson v. State*, Del. Supr., 707 A.2d 350, 354 (1998).

¹⁶ See *Tice v. State*, Del. Supr. 624 A.2d 399, 403 (1993) (stating that "the right of confrontation is not absolute, but rather, is subject to the trial court's discretion regarding scope.") (citation omitted).

(12) Similarly, there was no improper restriction on Lecato’s cross-examination of DiGirolomo at trial. The record shows that the Superior Court sustained objections to certain questions put by Lecato that asked DiGirolomo to agree that his testimony about the street light would “be in the best interest of your case” and would “enhance the testimony as to how bright it was that night.” These questions were argumentative and confusingly invited DiGirolomo to comment on his own credibility as a witness. After the objections were sustained, Lecato’s counsel moved on to another topic. He was not, however, restricted from rephrasing and putting further questions to DiGirolomo had he chosen to do so. DiGirolomo had already testified before the jury on direct and cross-examination that he could not recall whether the street light had been there on the night of the crime. Therefore Lecato’s constitutional right to confront witnesses was not impaired.

(13) Lecato’s next claim on appeal is that the State’s closing argument misstated and impermissibly diluted the State’s burden of proving guilt beyond a reasonable doubt.¹⁷ The basis for this claim is the following excerpt from the State’s closing argument:

And it’s a little confusing sometimes when people say the State has got to prove guilt beyond a reasonable doubt. To speak more accurately, what the State’s got to do is present evidence, and you as the jurors then decide whether that evidence

¹⁷ The Superior Court instructed the jury before closing arguments.

establishes guilt beyond a reasonable doubt. You make that evaluation. You weigh the evidence. You decide whether you have got a reasonable doubt. And a reasonable doubt is not any doubt. It's not a doubt based on speculation or on some theoretical possibility. Anything is theoretically possible.

Lecato made a timely objection to these remarks. The Superior Court overruled the objection.

(14) This Court reviews for abuse of discretion the Superior Court's decision to overrule an objection and not to give curative instructions.¹⁸ Of course, the State is constitutionally required to prove every element of the crime charged beyond a reasonable doubt.¹⁹ In this case, we find that the State's closing argument did not deprive Lecato of the reasonable doubt standard. The import of the State's remarks is that the jury had to weigh the evidence for itself and that it should not confuse "any doubt" for "reasonable doubt." There is no reasonable likelihood that these remarks caused jurors to apply the wrong standard of proof.²⁰ Therefore the Superior Court did not err in overruling Lecato's objection.

¹⁸ See *Harris v. State*, Del. Supr., 695 A.2d 34, 39 (1997); *Claudio v. State*, Del. Supr., 585 A.2d 1278, 1281 (1991).

¹⁹ See *Mills v. State*, Del. Supr., 732 A.2d 845, 849-53 (1999).

²⁰ See *id.*

(15) Because the four specific claims of error made by Lecato are without merit, his final claim that the cumulative effect of the alleged errors deprived him of a fair trial is also denied.²¹

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ E. Norman Veasey
Chief Justice

²¹ See *Cruz v. State*, Del. Supr., No. 318, 1991, 1993 WL 227080, *8, Moore, J. (June 4, 1993) (ORDER) (“Although it is true that cumulative errors may result in the denial of a fair trial, *see Wright v. State*, Del. Supr., 405 A.2d 685 (1979), where, as here, no such errors are found to exist, the claim fails.”)